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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 704

THE UNITED STATES, *Petitioner*,

vs.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

On a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

QUESTIONS PRESENTED.

1. Are the claims of the former alien enemy respondents barred from allowance by the four year period of limitations, when it is considered that all of their right, title and interest in and to the estate of Rosa von Zimmermann, deceased, was seized by the Alien Property Custodian on June 12, 1918, and any refund of estate taxes forms a part of their residuary estate which was seized? Congress first restored any of their property rights by the Winslow Act of March 4, 1923. If the period of their legal disabil-

ity June 12, 1918, to March 4, 1923, is deducted from the four year period, their claims were filed in due time.

2. Are the claims of the Alien Property Custodian barred from allowance?

3. Is the amount paid out of the estate to the State of California by the executors as the California inheritance tax on the estate a lawful deduction from the gross estate under Section 203 (a) (1) of the Revenue Act of 1916.

STATEMENT.

The decedent, Rosa von Zimmermann, at the time of her death on April 25, 1917, was a resident of California and a German alien enemy. She left a will making certain minor bequests, and devising and bequeathing all of the rest of her property to her three sisters, Klara Kombst, Gertrude Luckhardt and Ilka Wichmann, and in the event of the death of any, her share to go to her legal heirs. Klara Kombst died in Germany on August 16, 1917, leaving as her sole heir the respondent, Barnim Kombst. Klara Kombst at the time of her death was a German alien enemy, and the respondents, Barnim Kombst, Gertrude Luckhart and Ilka Wichmann were at all times during the World War alien enemies resident in Germany. In the decedent's will, she named two American executors.

The executors filed with the Collector of Internal Revenue at Los Angeles, California, a Federal estate tax return for the estate of the decedent, showing a net estate of $1,861,152.35, and tax due of $138,908.51, which was paid by the executors on April 19, 1918. The Commissioner of Internal Revenue increased the value of the net estate to $1,927,610.88 and assessed an additional tax of $5,981.27, which was paid by the executors on September 10, 1918.

On October 23, 1918, the executors paid to the proper officers of the State of California out of said estate an inheritance tax of $261,811.42. (R. p. 13)

On June 12, 1918, prior to the payment of the California

inheritance tax which gives rise to this action, the Alien Property Custodian pursuant to the Trading with the Enemy Act, approved October 6, 1917, and the Executive orders issued thereunder, served a notice and demand upon the executors to convey, transfer, assign, deliver and pay to him every right, title and interest of the enemy beneficiaries in and to the estate.

The authorities uniformly hold that a demand of this kind vests in the Alien Property Custodian legal title to the property demanded, and that the failure of the Alien Property Custodian to reduce the property to his possession immediately does not effect his legal title or dominion over the same.

On October 26, 1922, the Superior Court of California in and for the County of Los Angeles, having jurisdiction over the estate, entered an order distributing the estate in accordance with the decedent's will and after the payment of debts and bequests to persons other than the former alien enemy beneficiaries, the residue of the estate was delivered to the Alien Property Custodian.

The Winslow Act of March 4, 1923, which for the first time restored any rights with respect to property seized from German alien enemies, provided for a return of principal not in excess of $10,000.00, and annual income from the seized property not in excess of $10,000.00. The Settlement of War Claims Act of 1928 provided for a return of property not in excess of 80 per cent of its value.

On December 27, 1923, the alien enemy beneficiaries filed formal claims for refund, and on January 31, 1924, the Alien Property Custodian filed a formal claim for refund all on the ground that certain foreign securities and other property were overvalued.

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the Alien Property Custodian and the alien enemy beneficiaries that claim for refund was also made on the ground that the

sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax.

On January 7, 1926, a formal claim for refund was filed with the Commissioner based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the gross estate of the said decedent in computing the net estate subject to the Federal estate tax. (R. p. 13) This claim was filed in the name of the Alien Property Custodian and the estate of Rosa von Zimmermann and was signed by the attorney in fact holding a power of attorney from the enemy beneficiaries and the Alien Property Custodian. (R. pp. 20-21)

On June 13, 1924, the Solicitor of Internal Revenue held that the original claims for refund were not barred by the statute of limitations. (Brief in opposition, p. 32)

On July 11, 1928, the Commissioner rejected the claim for refund on the ground that the California tax was not deductible. (R. p. 13) Suit was instituted in the Court of Claims on December 18, 1928.

ARGUMENT.

I.

The Claim for Refund is Not Barred by the Statute of Limitations.

The respondents have heretofore filed quite a lengthy brief, and therefore unnecessary repetitions will be avoided as much as possible.

The Federal estate taxes were paid on April 19, 1918, and September 10, 1918. The California tax was paid on October 23, 1918. The deductibility of this tax gives rise to the action herein. The German alien enemy respondents were entitled to the entire estate after the payment of debts and certain legacies.

On June 12, 1918, prior to the payment of the California tax, all the right, title, and interest of the German alien enemy respondents in and to the estate was seized by the Alien Property Custodian. (R. p. 12) The demand which was served was full and complete. (R. pp. 17-19) By this demand, the Alien Property Custodian did not merely acquire control and possession, but acquired legal title to the German alien enemy respondents' residuary estate, or any property that is properly a part of the residuary estate, or any income flowing from such seized property. (*Farbwerke Vormals v. Chemical Foundation*, 283 U. S. 152; *Great Northern R. Co. v. Sutherland*, 273 U. S. 182; *U. S. v. Chemical Foundation*, 272 U. S. 1; *Swiss National Insurance Co. v. Miller*, 267 U. S. 42; *Commercial Trust Co. v. Miller*, 262 U. S. 51; see other cases referred to in brief in opposition, p. 11.) The demands served in the instant case contained broad language, and the German alien enemy beneficiaries thereby became divested of their title to the corpus, and the title vested in the Alien Property Custodian. This is not a case where an American citizen claims any interest in seized property, or where there is any question as to identification of seized property. The fact that there was ample property to pay the debts and other legacies and the fact that the German alien enemy beneficiaries had a right, title and interest in the estate are illustrated by the actual delivery of the property seized to the Alien Property Custodian on October 26, 1922. (R. p. 13) All debts and legacies must be paid before any property is paid to residuary legatees or devisees. While the executors were not discharged until October 26, 1922 (R. p. 12), their activities in settling the estate certainly did not affect the title of the Alien Property Custodian to the property which he had seized. The demand which was served was a valid one. It was addressed to the executors who had custody of the estate, and it referred to the estate of the decedent. It named the

alien enemy who had an interest in the estate, and seized every right, title and interest of said enemy in and to the estate which the enemy may now and hereafter be entitled to receive. The nature of the demand was plain and unambiguous, and it described the specific property which was seized. In seizing stock, money or other property, it was not necessary for the Alien Property Custodian to specify the exact amount in order to make the seizure valid.

As all debts against the estate and other bequests were paid prior to the delivery of the German alien enemy respondents' residuary estate, any refund of Federal estate taxes forms a part of the residuary estate which was seized by the Alien Property Custodian on June 12, 1918, prior to the payment of the California tax.

In view of the fact that there was ample property in the decedent's estate to pay the debts and bequests to persons other than the German alien enemy respondents, any suit by the executors to secure a refund of taxes which would ultimately become a part of the residuary estate would certainly be in substance a suit on behalf of the residuary legatees and devisees who in this case were enemies. An executor is merely a nominal party who acts for the real parties in interest. The executors had no more right to prosecute a suit for the recovery of taxes which would ultimately become a part of the residuary estate than the alien enemies themselves, and they had no rights. (*Borovitz v. American Hard Rubber Co.*, 287 Fed. 368) Aside from this, they could not prosecute a suit for the recovery of the taxes, because the residuary estate, including any property which they may hereafter become entitled to, was seized by the Alien Property Custodian on June 12, 1918.

Congress by the Winslow Act of March 4, 1923, provided for a return of principal of seized property to a German alien not in excess of $10,000.00, and annual income not in

excess of $10,000.00. The Settlement of War Claims Act of 1928, provided for a return of principal not in excess of 80 per cent of the value.

The executors and the alien enemies were under a complete legal disability from prosecuting a claim for refund from the time of the payment of the California tax on October 23, 1918, until March 4, 1923, when Congress for the first time restored any of the alien enemies' property rights. (*Sturchler v. Sutherland*, 19 F. (2d) 999)

The four year period for filing a claim for refund is a general statute of limitations. (*Hills v. U. S.*, 55 F. (2d) 1001, 1002). It was designed to prevent laches on the part of taxpayers. In the Trading with the Enemy Act, the running of any statute of limitations with respect to certain commercial transactions was specifically suspended until after the war or until the funds or property shall be released, and it was also provided that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law. (Brief in opposition, p. 15) It is well settled that under the existing law a general statute of limitations is suspended with reference to an alien enemy for the period of the legal disability. (*Borovitz v. American Hard Rubber Co.*, 287 Fed. 368; *Hanger v. Abbott*, 5 Wall. 532; *Crawford et al. v. The William Penn*, Fed. Case No. 3,372; *Sierra v. United States*, 9 Ct. Cls. 224; *Freeborn v. The Ship Protector*, 9 Wall. 687; *Levy v. Stewart*, 11 Wall. 244; *United States v. Wiley*, 11 Wall. 508).

The period of disability in the instant case was longer than the duration of the war, as the property was seized and no rights were restored therein until March 4, 1923. In so far as the alien enemy respondents are concerned, the period of their legal disability continued from the time of the payment of the California tax on October 23, 1918, because the payment of this tax gives rise to the action

herein and prior to that date the residuary estate was seized by the Alien Property Custodian, to at least March 4, 1923, the date of the Winslow Act, and if this period of legal disability is deducted from the four year period of limitations, then the claims of the alien enemy respondents were filed in ample time.

Formal claims for refund were filed by the alien enemy respondents and by the Alien Property Custodian on December 27, 1923, and January 31, 1924, respectively, on the ground that certain foreign securities and other property were overvalued. On November 23, 1925, the Commissioner was advised by letter on behalf of the Alien Property Custodian and the alien enemy beneficiaries that claim for refund was also made on the ground of the deductibility of the California tax. This served as an amendment of the original formal claims for refund, and pointed out to the Commissioner another specific ground for the allowance of the claim. (*Tucker v. Alexander*, 275 U. S. 228; *Lasher v. United States*, 65 C. Cls. 295) The Government has not complained about the sufficiency of this amendment. The Commissioner had all of the necessary facts, and a question of law was presented by this amendment. A formal claim on the ground of the deductibility of the California tax was filed on January 7, 1926. This claim was in the name of the Alien Property Custodian and Estate of Rosa von Zimmermann and was signed by the attorney in fact holding a power of attorney from the alien enemy beneficiaries and the Alien Property Custodian. All powers of attorney are on file with the Court of Claims. The naming of the estate in the claim was equivalent to naming the alien enemy beneficiaries.

The alien enemy respondents concede that if there is any refund, it must be paid to the Alien Property Custodian, as that officer seized their property, and any refund is a part of their property. It is contended that the four year period of limitation is inapplicable to the Alien Property Custodian's claim for refund in the instant case.

In *United States v. Nashville & Ry. Co.*, 118 U. S. 120, 125, it is held:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." (See also *United States v. White & Wheless*, 246 U. S. 552, 561.)

In *DuPont DeNemours & Co. v. Davis, Director General of Railroad*, 264 U. S. 456, 462, it is said:

> "In taking over and operating the railroad system of the country the United States did so in its sovereign capacity, as a war measure * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it."

In taking over the property of alien enemies, the Alien Property Custodian did so in a sovereign capacity, as a war measure, and in reducing to physical possession, property which he had seized during the war, he acts in a sovereign capacity, and is still acting as such.

The ex-enemy respondents could not have compelled the Alien Property Custodian to file a claim for refund during the four year period.

The Knox-Porter Resolution declaring war at an end on July 2, 1921, clearly showed that it was not the purpose of Congress to return property to German alien enemies until Germany made suitable provision to satisfy the claims of American citizens and there was no assurance prior to

March 4, 1923, that any property would be returned. At the time the claims for refund were filed, the property rights which were restored to the German alien enemies were merely those provided for in the Winslow Act of March 4, 1923. The disposition of seized property was dependent upon future legislation. When at the present time, the Alien Property Custodian reduces to physical possession, the corpus of property seized during the war, or the income from seized property, he is still acting in a sovereign capacity. There is no distinction from a strict legal standpoint between seized property in the hands of the Government or in the hands of a private citizen. The Alien Property Custodian is still reducing to possession property seized during the war, because the United States today is entitled in any event to retain 20 per cent of the value of the property. (*Thoms v. Sutherland,* 52 F. (2d) 592, decided Sept. 28, 1931)

General Counsel's Memorandum 4978, referred to by the petitioner, dealt with the statutory period for making an assessment. The Government was under no legal disability from making an assessment against an enemy or estate of an enemy or effecting collection, and furthermore if no return was filed, the statutory period has not run. General Counsel's Memorandum 5000 is contrary to Solicitor of Internal Revenue's decision dated June 13, 1924, in the instant case in which it was specifically held that the claim was not barred from allowance. (Brief in opposition, p. 32) Section 24, Trading with the Enemy Act, as amended by Section 18, Settlement of War Claims Act of 1928 (40 Stat. L., 411, as amended by 42 Stat. L., 1511, as amended by Public, No. 122, Seventieth Congress) established an orderly system of paying taxes by the Alien Property Custodian, and conferred certain benefits to ex-enemy taxpayers. The ex-enemy respondents in the instant case are not entitled to any of these benefits. The period of limitations for securing these benefits was extended by Section 24 (f). The legislative history re-

ferred to in the decisions of the General Counsel is not helpful to the petitioner's cause. As the Act conferred certain benefits and changed the tax liability of certain enemies, it was probably deemed unwise to legislate on the subject of the statute of limitations where no change was made in the tax liability. Furthermore, Congress knew of the provision in the Trading with the Enemy Act with respect to the suspension of the statute of limitations, and probably felt that it would be the best legislative policy to let existing law take care of the legal disability of certain ex-enemy taxpayers.

Judge Green of the Court of Claims participated in the decision of this case, and he was Chairman of the Ways and Means Committee at the time of the consideration of the legislation contained with Settlement of war claims Act of 1928.

The decision of the Court of Claims in the instant case was specifically called to the attention of the Ways and Means Committee of the House. (Hearings before the Committee on Ways and Means, 72nd Congress, 1st Session, p. 392) The Revenue Bill of 1932 which has passed the House does not contain any provision to avoid the effect of the decision of the Court of Claims in the instant case, thereby giving legislative approval to a judicial construction. Section 810 of the Revenue Bill of 1932 dealing with the period of limitations for filing a claim for refund of Federal estate taxes does contain language to avoid the effect of the decision of the Court of Claims in *Hills v. U. S.*, 55 F. (2d) 1001. The House probably felt that the decision in the Barnim Kombst case was consonant with justice and no legislation was required to alleviate the situation respecting the statute of limitations as applied to ex-enemy taxpayers.

II.

The California Inheritance Tax is Deductible Under the Revenue Act of 1916.

The argument supporting the deductibility of the California inheritance tax appears in the brief in opposition. It is contended that the decisions of this Court in *Keith v. Johnson,* 271 U. S. 1, and *U. S. v. Mitchell,* 271 U. S. 9, allowing the New York and Texas inheritance taxes as deductions, control the instant case. This Court in the above cases, speaking through Mr. Justice Butler, has laid down certain standards in determining whether the inheritance tax is a charge against the estate. In the decision of *Keith v. Johnson, supra,* it is said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased at rates graduated according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. They are not entitled to discharge until the tax is paid. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death. And the state's portion is deductible from the legacy and does not pass to the legatee. If money is transferred the tax is withheld; property other than money passes subject to the transfer tax."

An examination of the California inheritance tax act of June 16, 1913, under which the estate in the instant case was taxed will show that all of the above elements are present in the California Act. (Brief in opposition, p. 2) In the respondent's brief, Appendix B, several material portions of the California inheritance tax which are important in determining whether the tax is a charge against the estate are omitted, such as Section 8 which makes the tax due and payable at the death of the decedent and requires the executor to give bond for the payment of the tax if he fails to pay within eighteen months, Section 10 (b) which authorizes an executor to sell so much of the property of the decedent as will enable him to pay the taxes in the same manner as property of a decedent is sold to pay the debts of the estate, and Section 11 which provides that an executor shall not be entitled to a credit in his account nor be discharged from liability, nor shall the estate be distributed until a receipt for the payment of the taxes shall be filed with the Court. These provisions make the California tax unlike that of Massachusetts, and the instant case is distinguishable from *Leach v. Nichols,* 76 L. ed. p. 453, decided by the Supreme Court on March 14, 1932, holding the Massachusetts tax not deductible.

In *Leach v. Nichols, supra,* it was said:

> "The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Payments required of an executor are only preliminary; ultimately they must be met by the beneficiaries. * * * The thing burdened is the right to receive."

In the instant case, after the payment of debts and certain minor bequests, all of the decedent's property was left to the alien enemy respondents. They had no right to receive, because they were German alien enemies resident in Germany and knew nothing of the death of the decedent which occurred on April 25, 1917, soon after the declaration of war against Germany. It would have been

unlawful for them to communicate with this country. They could not pay the tax if they wanted to. Furthermore all of their right, title and interest in and to the estate was seized by the Alien Property Custodian on June 12, 1918.

Under Section 10 (b) of the California Act of 1913, the executors could pay the taxes in the same manner as they were enabled by law to pay the debts of the estate. Certainly debts are charges against an estate. The California tax due on the estate was fixed at the instant of death, and due and payable at the time of death. Irrespective of whether the ex-enemy respondents ever received a penny out of the estate would not affect the amount owing on the same as the California tax. That the executors paid the tax and paid it out of the estate of the decedent is clear from the finding of fact made by the Court of Claims. (R. p. 13)

The latest expression of the Supreme Court of California as far as we have been able to discover descriptive of the California tax is contained in *Estate of Letchworth*, 201 Cal. 1, decided April 2, 1927, wherein it was said:

> "It is well settled in this state, as well as in other jurisdictions where the laws provide for the collection of an inheritance tax, that the tax imposed by the inheritance tax statute is on the transfer of the property or on the right to succeed to the property rather than on the property itself. * * *
>
> "It must be apparent, we think, from the provisions of the statute above quoted that the tax is only imposed upon the transfer of the excess over the exemptions and paid upon the remainder of the property after deducting the exemptions."

This case unequivocally holds that the California inheritance tax is a transfer tax. It is not one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir, as quoted from *Estate of Kennedy*, in the respondent's brief. In the *Kennedy* case, it was held that

under the Tax Act of March 20, 1905, property of a decedent set apart absolutely as a homestead by the Court in probate under the provisions of Section 1465 of the Code of Civil Procedure, and moneys paid under order of the probate court under section 1466 of the Code, do not pass by will or by the intestate laws of the State, and are not subject to tax.

The California tax is certainly not one solely on the legatee as to such property as he actually takes on distribution, for in the *Estate of Hite,* 159 Cal. 392 (quoted at length in brief in opposition, pp. 5-7), it was held that the California tax attaches at the instant of death based upon the value at date of death, and attached to property left by the decedent even though the executor who served without bond appropriated $98,991.10 to his own use and the residuary legatees never received this money. This decision has the same legal effect as in *Re Hubbard,* 234 N. Y. 179, relied upon by the Supreme Court in *Keith v. Johnson,* 271 U. S. 1, where it was held that, "The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time."

In the decision of *New York Trust Co. v. Eisner,* 256 U. S. 345, the Supreme Court relied upon *Re Gihon,* 169 N. Y. 443, 62 N. E. 561, which held the New York transfer tax to be a succession tax. In *Keith v. Johnson,* 271 U. S. 1, holding the New York transfer tax deductible under the Revenue Act of 1916, this Court relied upon *Home Trust Co. v. Law,* 204 App. Div. 590 and Re Hubbard, *supra.*

In *Estate of Miller,* 184 Cal. 674, it was held that the Federal estate tax due under the Act of 1916 and the Nevada inheritance tax upon stock in a Nevada corporation were deductible in determining the California tax in the case of a resident of California.

In *Estate of Potter,* 188 Cal. 55, it was held that a gift of property made on October 22, 1908, was subject to the

tax in force at that time and could not be subjected to the tax in force at the time of decedent's death in 1916. It was said in that case (p. 59):

> "It is settled law that the tax is levied on the transfer of title, or on the exercise of the right to transfer the title, including of course, the right of the transferee to receive it, and not on the property itself. * * *
>
> "It is also settled that the right to such a tax vests in the State at the date of the taxable transfer. * * *"

It is clear from the law of California that the inheritance tax attaches at the instant of death and is measured by the value at the date of the decedent's death. It is payable out of the property in the hands of the executor and not out of the property which a legatee receives. The legatee by reason of depreciation in the value of the property, or wrongful appropriation, may not receive a penny on distribution, but nevertheless the tax is payble by the executor measured by the value at the date of death. In the instant case, the ex-enemy respondents did not receive a penny on distribution. Under Section 10 (b) of the California inheritance tax act, the executors had the right to sell so much of the property to pay the tax just as they had in the case of debts of the estate. The California tax is just as much a charge against the estate as a debt left by the decedent.

CONCLUSION.

In conclusion, we submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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Dated at Washington, D. C., April 20, 1932.